

No. 82-2012

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1982

ALBERT T. EHLERS,

*Petitioner,*

VS.

CITY OF DECATUR, GEORGIA,

*Respondent.*

**RESPONDENT'S BRIEF**

**In Opposition to Petition for a Writ of Certiorari  
to the  
UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT**

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## **QUESTIONS PRESENTED FOR REVIEW**

May a litigant prosecute an appeal from the denial of a Rule 59, FRCP, Motion For Reconsideration of a portion of a judgment after having accepted the benefits of that portion of such judgment favorable to his contentions?

## **CERTIFICATE REQUIRED BY RULE 34(1)(b)**

The undersigned, counsel of record for Respondent, certifies that the following listed parties have an interest in the outcome of this case.

Albert T. Ehlers  
Robert John Genins  
Thomas O. Davis  
H. A. Stephens, Jr.  
Ann Crichton  
Steve Johnson  
Bob Carpenter  
J. Lamb Johnston  
Ted O'Callaghan  
M. A. Smith  
Jack W. Collins

Every citizen, resident, and  
taxpayer of the City of  
Decatur, Georgia

**HOSEA ALEXANDER STEPHENS**  
Attorney for Respondent

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**STATEMENT OF THE CASE**

The only issue addressed by the Eleventh Circuit Court of Appeals being the effects flowing from acceptance by Petitioner of funds paid into the registry of the District Court by Respondent in satisfaction of the judgment entered against it, no detailed statement of the case is deemed necessary. The crux of its holding lies in the following quotation from the Court's opinion [P.App. 11]:

"Appellant's acceptance of the attorney's fees award from the clerk of the court acts as a bar to this appeal."

No other issue having been reached or discussed by the Eleventh Circuit Court of Appeals, factual background of the controversy and its procedural history are totally without relevance.

## REASON FOR DENYING THE WRIT

The decision of the Eleventh Circuit Court of Appeals accords with this Honorable Court's decision in *Donovan v. Penn Shipping Co., Inc.*, (1977), 429 U.S. 648, 97 S.Ct. 835, 51 L.Ed. 2d 112, the decision of the Court of Claims in *Cherokee Nation v. United States*, (Ct.Cl.), 355 F.2d 945, 174 Ct.Cl. 131, and holdings of other courts.

## SUMMARY OF ARGUMENT

By accepting from the Clerk payment of the funds paid by defendant in satisfaction of the judgments entered on the verdict of the jury and Order of the Court awarding attorney's fees, Plaintiff waived any right to appeal from denial of his Rule 59 Motion to alter or amend.

4 *American Jurisprudence 2d*, § 250, p.745

4 *CJS, Appeal & Error*, § 215, p. 644

*Cherokee Nation v. United States*, (1966) Ct. Cl.), 355  
F.2d 945, 949, 174 Ct. Cl. 131

*Donovan v. Penn Shipping Co., Inc.*, (1977), 429 U.S. 648,  
97 S. Ct. 835, 51 L.Ed 2d 112

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## LAW AND ARGUMENT

### I.

#### **Petitioner Waived Any Right To Appeal Denial Of The Motion To Alter Or Amend By Accepting The Funds Deposited In The Registry Of The Court In Satisfaction Of The Judgments**

In *Donovan v. Penn Shipping Co., Inc.*, (1977) 429 U.S. 648, 97 S. Ct. 835, 51 L.Ed. 2d 112, this Honorable Court held:

“----a plaintiff in federal court, whether prosecuting a state or federal cause of action, may not appeal from a remittitur order he has accepted.”

Views of text-writers and other courts are in accord.

In 4 *American Jurisprudence* 2d, §250, p.745, the general principle is stated:

“A party who accepts an award or legal advantage under an order, judgment, or decree ordinarily waives his right to any such review of the adjudication as may again put in issue his right to the benefit which he has accepted. This is so even though the judgment, decree, or order may have been generally unfavorable to the appellant.”

More broadly expressed is the statement appearing in 4 *CJS, Appeal & Error*, §215, p. 644:

“It is a rule of general application that a party cannot accept the benefits of a judgment, order, or decree and afterward prosecute an appeal or writ of error to review it; he cannot, in case of independent provisions, accept the benefits of the part which is favorable and appeal from the part which is unfavorable; nor can he, making such acceptance, reserve the right to appeal.”

The foregoing was quoted and applied in *Cherokee Nation v. United States*, (Ct.Cl.), 355 F.2d 945, 949, 174 Ct. Cl. 131.

Donovan, *supra*, was followed by the Fifth Circuit Court of Appeals in *Krahn v. B.F. Goodrich Company, et al*, (1977), 5 Cir., 559 F.2d 308.

## II.

### **Decisions Relied Upon By Petitioner Are Distinguishable**

*Gilfillan v. McKee*, (1895), 169 U.S. 303, 40 L.Ed 161, 16 S. Ct. 6, involved separate decrees against two separate funds. The decree was also several, the interest of each defendant thereunder being separate and distinct. Here, the judgment was entered in favor of Petitioner against Respondent for "attorney's fees for services by Mr. Genins" -- there was no separate judgment in favor of Mr. Genins.

*Kaiser v. Standard Oil Co. of New Jersey*, (1937), (5 Cir.), 89 F.2d 58, is actually adverse to appellant's contentions, as evidenced by the following excerpt from the opinion (p. 59):

"Accepting the fruits of a judgment and thereafter appealing therefrom are totally inconsistent positions, and the election to pursue one course is deemed an abandonment of the other."

In *B & G Electric Company v. G.E. Bass & Company, Inc.*, 5 Cir. 1958, 252 F.2d 698, while the appeal of *B & G Electric Company* was permitted to proceed procedurally the judgment of which it complained was affirmed on the merits.

*Shaffer v. Great American Indemnity Co.*, 5 Cir., 1945, 147 F.2d 981, involved workers' compensation benefits as to which there was ongoing liability, and vastly differing facts.

Furthermore, all of the foregoing ante-dated this Honorable Court's decision in *Donovan supra*, which Respondent submits constitutes controlling authority.



Respondent respectfully submits the Petition for a Writ of Certiorari in this case should be denied.

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